The Strategic Use of Pre-Trial Motions

(Note: For a checklist of common motions in criminal cases in Montana, see below)

I. Objective

A. Pre-trial motion practice is often neglected, probably because of the probability and the assumption that the great majority of the motions will be denied and because counsel is not yet "into" the case. It is the purpose of this paper to emphasize the importance of motion practice in contributing to the ultimate goal of winning the case.

II. Prerequisite to Motions

A. Prior to determining what motions to file, you must arrive at a "trial plan."

a. The trial plan consists of a defense, the defense theory, ways to deal with the evidence of the prosecution, what evidence to put on, etc., so that you are aware of what needs to be advanced strategically.

b. Formulating a trial plan and operating from it is in contrast to conducting the trial "off the top of your head."

c. It is vital that your motion practice in the case fit into the trial plan and advance the trial plan.

d. If your motion practice is to advance the trial plan by setting up the trial, the general trial plan must be in hand before you plan the motions. Only then can the motions advance the trial plan.

III. Purposes of Motions

A. **To win the case!** This is the obvious purpose and an important one but you must use imagination and creativity to serve the several other purposes listed below.

B. To set up the trial

a. Get information. In addition to information obtained by discovery, be alert for statements the prosecutor makes during hearings on motions to the effect that he will or will not use certain evidence, witnesses, exhibits, etc.

b. Pin down the testimony. When witnesses testify at hearings, their testimony is on record so that during cross-examination at the trial, their testimony will have to be the same or they can be impeached by the previous inconsistent statements from the motions hearing.

c. Create inconsistencies. The more witnesses talk or testify the more inconsistencies develop. Do not use them during the motions hearing, in general, but save them for use during the trial.

d. Set up your defense theory. Be aware of what facts can be of use to you during trial and ask about them during motion hearings. If the answer is helpful, you have it; if the answer is bad, you know not to ask the question at trial.

e. Have a total view. Do not be thinking only of the issue of the hearing, but constantly be aware of other motion hearings or, more importantly, the trial and get what will help on those later occasions.

C. **To aid in plea negotiating**. Prosecutors are often busy and would rather "deal" than prepare for and possibly lose the defense motions. It also sometimes allows the prosecutor to use the possibility of the motions being granted to justify to the police the taking of a plea to a lesser offense.

D. **To make a record for appeal**. Pre-trial motions, along with instructions, furnish the most fertile areas for getting convictions reversed. You can make a thorough record without a jury being concerned about technicalities being raised.

IV. Organization of Legal Materials for Motion Practice

A. Set up legal memo files, a loose-leaf notebook, or both, so that necessary checklists, legal authorities, etc., can be readily found.

B. Recognize that in motion practice the same authorities are on point over and over. It is tremendously wasteful of time and results in inadequately supported argument if these authorities are not organized and readily available.

C. Use an "up front" system of gathering authorities rather than starting research at the beginning as each point comes up. The "up front" system requires that when decisions come down or one comes across something useful, it is at that time put into the legal materials system.

D. Concentrate on materials in which there was reversal for the defendant on the point, useful quotations, and avoid the tendency to accumulate too much material.

E. Use checklists. They help to avoid forgetting important motions and save time in planning motions.

V. Some Precautions

A. There may be times when it is better to "lie low" since motions may force the prosecutor to "get into" the case when he otherwise would not.

B. Avoid giving clues through motions or during the hearings as to your theory of defense.

C. You should not file a motion just because you have one available.

VI. Checklist of Motions in Criminal Cases

Note: Section 46-13-101, MCA, requires, except for good cause, any defense motion , or request that is capable of determination, without trial of the general issue must be raised pre-trial, or the motion is deemed. All such motions must be in writing, supported by memorandum, wherein, or by affidavit, all the relevant facts, good or bad, must be included. The only exception to making a pretrial motion is that lack of jurisdiction or failure of the charging document to charge an offense may be noticed by the court at any time during the pendency of the proceeding. Section 46-13-101(3).

A. Motion for O.R. (Personal Recognizance) Bond (46-9-111, M.C.A.)

B. Motion for Bail Reduction (46-9-311, M.C.A.)

C. Motion for Preliminary Hearing (when felony charges have been initially filed in a court of limited jurisdiction.) (46-11-203, M.C.A.)

   a. The preliminary hearing, of course, can be used to gain dismissal of the charge but since this does not often occur, its most frequent purpose is setting up the trial.

   b. The trial can be set up by getting information, pinning witnesses down, creating inconsistencies, testing witnesses to determine what kind of cross-examination is most effective, etc.

D. Motion to Withdraw

E. Motions for Continuance (46-13-212, M.C.A.)

1. Either prosecution or defense can so move if made 30 days after arraignment or at any time after trial has begun.

2. Court may require motion to be supported by affidavit.

F. Motions to Suppress

1. Confession / Admission / Statements (46-13-301, M.C.A.)

a. Confession may not be introduced by prosecution at trial until state has introduced independent evidence tending to establish the commission of a crime. (46-16-215, M.C.A.)

b. Homicide cases: the independent evidence must establish death and causation. (45-5-111, M.C.A.)

c. See also: 46-4-401, M.C.A. (re: electronic recordings)

b. Further comments on motions to suppress statements:

a. Try to get evidence which will result in suppression.

b. Trying to get evidence resulting in suppression may result in your getting evidence with which to attack the statement before the jury. The detective may deny that there was any conversation other than some brief statement which was taken. You have first obtained evidence of when the interrogation started and when it ended. You may have a three-line statement that took thirty minutes to get. You then argue credibility to the jury.

c. Get particulars of taking of the statement. It is often in the detective's words, paraphrased or with the detective making statements with the defendant periodically agreeing. Look for words in the statement that a detective would use but that the defendant would not.

2. Identification

a. **Further comments on motions to suppress identification**: Getting matters likely to arise during trial determined before trial serves important purposes. For one thing, it clues you in on how to plan for the trial. It also makes your on-the-record position clear so that you don't have to object in front of the jury. It also helps identify other reasonable objections that may be more readily raised thereafter.

b. The obvious use is to gain suppression.

c. The important strategic purpose is getting answers to questions about the identification that effectively support the argument that there is a misidentification. The questions should be asked in the suppression hearing. If the answer is not helpful, do not ask it in trial; if it is helpful you do ask it in trial.

d. The following is a checklist of factors to probe for, all of which support the conclusion that there was or may have been a misidentification.

    i. There was inadequate opportunity to observe.

    ii. The lighting was bad.

    iii. The witness saw the culprit for only a short time.

    iv. The opportunity to observe was or was mostly before the witness knew of anything unusual.

    v. The witness was scared.

    vi. The witnesses compared notes.

    vii. There was a considerable lapse of time between the crime and the identification procedure.

    viii. The witness and the culprit were strangers.

    ix. The identification evidence was bad in this case

    x. Other witnesses did not identify the defendant.

    xi. Other witnesses identified someone other than the defendant.

    xii. The description of the defendant does not match the description given shortly after the crime.

    xiii. The description given was a vague description.

    xiv. The identification keeps getting stronger as time goes on.

xv. There was uncertainty about the culprit and what happened shortly after the event but certainty now.

xvi. The witness went from uncertainty to certainty as a result of suggestion and reassurance.

xvii. There are inconsistencies between testimony and physical facts, between the testimony of various witnesses and within the testimony of various witnesses and within the testimony of the identification witnesses showing they can be wrong.

xviii. There were a number of "things not done" in the investigation process.

xix. Evidence supports (even if it does not prove) the conclusion that someone else did it.

xx. No circumstantial evidence shows the defendant did it and likely would if he were the culprit.

3. Evidence (Warrantless) or Evidence (Pursuant to Warrant) or Evidence (Incident to a Lawful Arrest) (46-13-302, M.C.A.)

a. The preliminary hearing can often be used to set up the motion to suppress since the police officer may be answering without being aware that his answers will be used to suppress at a later hearing.

b. Checklist for Attacking Search and Seizure

i. Defendant has standing as a "person aggrieved."

ii. 4th Amendment protections extend to circumstances of this case.

iii. What occurred was a search and seizure

iv. The affidavit supporting issuance of the warrant is insufficient

a. Conclusions must be excluded from consideration.
b. Untrue allegations may be excluded
c. The underlying facts set forth do not constitute probable cause.

i. Facts set forth do not make crime probable
ii. The two-prong test as to a confidential reliable informant
    1. Underlying facts.
    2. Credibility of informant has been met.
iii. There is insufficient corroboration for information from a first-time informant.
iv. The particularity requirement that facts show that items are at a particular place has not been met.
v. The particularity requirement that facts show particular items which are at a place to be searched has not been met.
vi. The requirement that items which are "mere evidence" be shown to contribute to apprehension or conviction has not been met.

d. The facts in the affidavit are stale.

v. The warrant is insufficient.
    a. The Court had no jurisdiction to issue the warrant.
    b. The officer executing the warrant was without authority.
    c. The warrant did not set forth with particularity the place(s) to be searched or the item(s) to be seized.
    d. Other requirements of the statute or rule of procedure have not been met.

vi. Execution of the warrant was improper.

    a. There was no knock or announcement.
    b. The execution was not in the daytime as required.
    c. The execution was not within the time allowed or was stale by time of execution.

vii. There was no warrant.

viii. The search was outside the warrant.

ix. The items seized were outside the warrant.

x. There was no exigent circumstance.

xi. The facts within the knowledge of the police at the time of the warrantless search did not meet the requirements of probable cause, etc., set forth above as to searches with a warrant.

xii. The search was not incident to a valid arrest.

xiii. There was no valid consent.

xiv. The items seized were not in plain view.

xv. There was no proper inventory search.

xvi. There was no reasonable suspicion justifying a stop short of arrest.

xvii. There was no sufficient reason for a pat-down search for weapons.

xviii. The evidence derived from an illegal arrest or other illegal action.

c. **Further comments on motions in limine**: Getting matters likely to arise during trial determined before trial serves important purposes. For one thing, it clues you in on how to plan for the trial. It also makes your on-the-record position clear so that you don't have to object in front of the jury. It also helps identify other reasonable objections that may be more readily raised thereafter.

Tips:

a. Review all reports to see if exigent circumstances are present.
b. Motions seeking to suppress on grounds of illegal search and seizure, if made, should emphasize Montana's constitutional right of privacy as Montana does not "walk lock step" with the federal circuits or the U.S. Supreme Court.

B. Motion for Joinder or Severance of charges (46-11-404, 46-13-210, and 46-13-211, M.C.A.)

d. Trial together prejudicial to moving defendant

e. Evidence admissible against co-defendant not admissible against moving defendant

f. Antagonistic defenses

g. One defendant testifying, other defendant not testifying

h. One defendant might testify for the other

i. Evidence stronger against one defendant than against other

j. Possible confusion of jury as to differing standards of responsibility and as to whom particular pieces of evidence apply, etc.

k. **Further Comments on motions to sever or join**: When there are multiple defendants or multiple counts, think through the case to determine whether your client is better off being tried with the codefendants or alone and on all or fewer of the counts. The presumption should be in favor of asking for severance but sometimes it is best to be tried with others when one can let most of the spotlight fall on the co-defendants.

C. Notice of Reliance on certain (affirmative) defenses (46-15-323, M.C.A.)

d. Generally speaking these must be filed within 30 days of arraignment or at the omnibus hearing.

e. Mental disease or defect which prevented defendant from acting with knowledge or purpose: Notice must be filed within 10 days of report on mental health.

f. Mental disease or defect which prevents a defendant from appreciating the criminality of behavior, or from conforming conduct to requirements of law: Notice must be given at omnibus or at change of plea (46-14-311, MCA.)

D. Motion for Disclosure of Informant (46-15-322 & -324, M.C.A. & Rule 502, M.R. Ev.)

E. Motion for Inspection of Evidence

F. Motion to Suppress Prior Felony Convictions

Note: A Notice of Persistent Felony Offender from the State must be sealed in the file until after trial.

G. Motion for a Bill of Particulars

H. Motion for Change of Venue (46-13-203 & -204, M.C.A.)

1. You must establish, other than with simply prejudicial pretrial publicity, an inability to get fair trial in county where case is filed.

I. Motion for Substitution of Judges (3-1-801, M.C.A.)

J. Motion in Limine

d. Some of the 22 District Courts have local rules setting the deadlines for such motions, or this happens in trial scheduling orders.

    a. Motions in limine should be filed, pretrial, on any other crimes evidence, found in discovery. Other crime evidence is set out in Rule 404(b). Some things, like "motive", under Montana's purpose or knowledge mental element, is not relevant. The other way to keep it out is under Rule 403, prejudicial effect outweighs probative value.

    b. File in limine to keep out a confession until state produces independent evidence of crime (see above)

    c. File in limine to keep out anything that might be covered by the "same transaction" rule. (26-1-103, MCA.) On this rule – and on other crimes evidence – prepare a cautionary jury instruction to be submitted in the event the court provides an adverse ruling.

    d. If your client will be testifying file in limine motions to keep out the criminal history. (**Exception**: Facts surrounding your client's prior conviction for perjury, false wearing, or another crime pertaining to credibility can be inquired about, although the conviction itself is inadmissible.)

e. At trial renew motions outside presence of jury if denied pretrial, renew them, outside presence of jury.

f. **Further comments on motions in limine**: Getting matters likely to arise during trial determined before trial serves important purposes. For one thing, it clues you in on how to plan for the trial. It also makes your on-the-record position clear so that you don't have to object in front of the jury. It also helps identify other reasonable objections that may be more readily raised thereafter.

K. Motions to Dismiss –

1. For Lack of Jurisdiction

2. For Failure to Charge an Offense

3. For Lack of Speedy Trial

    a. Look at *State v. Couture,* 2010 MT 201 and *State v. Ariegwe*, 2007 MT 204. Sets out criteria for analysis.

4. For Lack of Speedy Process or Pre-Arraignment Delay

Note: In misdemeanor cases prosecution must be dismissed with prejudice if the defendant has not been tried within 6 months of entry of not guilty plea – unless "good cause" exists. (Exception: The 6 month rule does not apply to misdemeanor trial de novo.)

L. Motion to dismiss for Double Jeopardy

M. Motion to Dismiss for Collateral Estoppel

N. Motion to Dismiss—Statute Unconstitutional on its Face

d. Statute vague and indefinite

e. Statute overbroad

f. Statute violates due process

g. State has no sufficient or compelling interest in regulating conduct involved

h. Statute violates equal protection

i. Statute violates equal protection in providing greater penalty for conduct indistinguishable from that prohibited by another statute

O. Motion to Exclude Witnesses During Trial (Rule 615, M.R. Ev. & 46-24-106, M.C.A.)

d. Should be mad no later than after jury is chosen and sworn.

e. The State generally does get to have the investigating officer sit at counsel table – and in such instance defense should argue for a reciprocal right.

P. Motion to Dismiss—Statute Unconstitutional as Applied

Checklist of Pre- and Post-Trial Motions

I. In the area of Defects with the Petition

A. Motion to Dismiss for Failure to State an Offense

B. Motion to Dismiss for Lack of Jurisdiction

C. Motion to Dismiss for Failure to Establish Venue

D. Motion to Dismiss (for Lack of Specifity)

E. Motion to Dismiss Because the Statute of Limitations has Lapsed

II. In the area of Double Jeopardy

A. Motion to Dismiss for Double Jeopardy Violation

III. In the area of Multiple/Joined Counts

A. Motion for Severance (of multiple counts)

IV. In the area of Co-Respondent(s) or co-respondent(s)

A. Motion for Severance (of the joined trial)

V. In the area of Change of Venue or Judge

A. Motion for Change of Venue

VI. In the area of Speedy Trial

A. Motion to Dismiss for Lack of Speedy Trial

VII. In the area of Suppression of Evidence

A. Motion to Suppress Physical Evidence (fourth Amendment Issues)

B. Motion to Suppress a Confession or Statements

C. Motion to Suppress an Identification

VIII. In the area of Discovery

A. Motion for Discovery

B. Motion for Additional Discovery

C. Motion for *In Camera* Inspection

D. Motion to Quash a Subpoena/Subpoena *Duces Tecum*

E. Motion for a List of Witnesses

F. Motion for Disclosure of Plea Agreement

G. Motion for Disclosure of Preferential Agreements with Witnesses

H. Motion for Production of Mental Health Records of Complainant

I. Motion for Disclosures Relating to Expert Witnesses

J. Motion for a Free Transcript

IX. In the area of Discovery or Subpoena Violations

A. Motion to Compel Discovery

B. Motion for Sanctions for Failure to Comply with Discovery

X. In the area of Medical Examination/Treatment

A. Motion for Medical Treatment

B. Motion for Medical Examination

C. Motion for Medical Examination of Complainant

XI. In the area of Competency

A. Motion for a Competency Hearing

XII. Post-trial Motions

A. Motion for Directed Verdict of "Not Guilty" (Dismissal). Section 46-16-403, M.C.A. provides that, at close of prosecution's case, or after all evidence is in, the evidence is insufficient to support a finding of guilty, the court may dismiss the action and discharge the defendant. Court may allowthe case to be reopened for good cause shown. Keep in mind, element of offense, state must prove and specifically argue the elements they have not proven such that a reasonable juror could find defendant guilty. See, State v. LaMere, 2003 MT 49, 314 Mont. 326, 67 P.3d 192: " [a] district court should grant a motion for directed verdict of acquittal only when there is no evidence whatsoever to support a guilty verdict.

B. Additionally, 46-16-702, M.C.A. sets forth the criteria for moving for a new trial. This motion must be made no later than 30 days after guilty verdict and must be served on state.